IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ENSCO OFFSHORE COMPANY, et al.,

Plaintiffs,

v.

KENNETH LEE "KEN" SALAZAR,

SECRETARY OF THE INTERIOR, et al.,

Defendants.

CIVIL ACTION No. 10-1941(F)(2)
SECTION F
JUDGE FELDMAN
MAGISTRATE 2
MAGISTRATE WILKINSON

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR STAY PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A TEMPORARY STAY PENDING RESOLUTION OF A STAY MOTION IN THE COURT OF APPEALS

Defendants Ken Salazar, the U.S. Department of the Interior, Michael R. Bromwich, and the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE") (collectively "Defendants"), hereby request that the Court, pursuant to Federal Rule of Civil Procedure 62(c), stay its Orders of February 17 and March 1, 2011 ("Orders") (Dkt. # 229, 250), pending Defendants' appeal to the United States Court of Appeals for the Fifth Circuit. In the alternative, Defendants request that the Court issue a temporary stay of those same Orders until resolution by the Court of Appeals of an emergency motion by the United States for a stay pending appeal pursuant to Federal Rule of Appellate Procedure 8(a).

I. INTRODUCTION

As this Court is aware, the Secretary of the Interior directed BOEMRE on May 28, 2010, and again on July 12, 2010, to issue a temporary suspension of certain pending, current, and approved

offshore drilling operations involving deepwater oil and gas wells. <u>See</u> PubIV000049;¹ PubIV000081-109. This temporary suspension was intended, *inter alia*, to afford BOEMRE the time it needed after the Deepwater Horizon incident to issue new safety and environmental protection rules. PubIV000100. On October 12, 2010, the Secretary indicated that a suspension was no longer needed because the issuance of new regulatory requirements, the killing of the Macondo well, and the development of containment standards and technology had improved drilling safety, blowout containment, and spill response capabilities. PubIV000196-200. The Secretary made clear, however, that all operators would be required to comply with applicable regulations and notices to lessees prior to obtaining a drilling permit. PubIV000198.

Plaintiffs, who would prefer the immediate approval of all drilling permits, alleged pursuant to 5 U.S.C. § 706(1) that BOEMRE had unreasonably delayed a final decision on nine applications for permits to drill. Plaintiffs sought, and this Court granted, an injunction compelling BOEMRE to issue a decision on five of those applications—pertaining to Nexen Petroleum U.S.A., Inc. ("Nexen") and Cobalt International Energy, L.P. ("Cobalt")—no later than March 19, 2011 (Dkt. # 229). Following that decision, Plaintiffs moved to supplement the Court's injunction with two additional applications pertaining to ATP Oil & Gas Corporation. The Court also granted that motion, compelling BOEMRE to issue a decision on those two applications no later than March 31, 2011 (Dkt. # 250). On March 4, 2011, Defendants noticed an appeal of those orders to the United States Court of Appeals for the Fifth Circuit.

Defendants now respectfully request that the Court stay its Orders pending Defendants' appeal. The Court's finding of unreasonable delay, and decision to compel action on the applications, were made in error. And compliance with the Court's Orders will greatly harm

¹ This citation format references the unique page identifiers in the Department of the Interior's Administrative Record for Count IV of Plaintiffs' Second Amended Complaint.

BOEMRE and the efficient development of oil and gas resources on the Outer Continental Shelf, as well as potentially harm the near-term interests of the operators who submitted the subject applications. The Orders only work to disrupt BOEMRE's more efficient, iterative practice of communicating application inadequacies to the applicant so that they can be corrected. BOEMRE instead now may be required to deny the applications outright, which in turn would frustrate Congress' stated preference that the Outer Continental Shelf be made available for "expeditious and orderly development subject to environmental safeguards." 43 U.S.C. § 1332(3). The Court should therefore stay its injunction pending appellate review.

In the alternative, if the Court decides against staying its Order pending appeal, Defendants respectfully request that the Court issue a temporary stay until resolution by the Court of Appeals of an emergency motion by the United States for a stay pending appeal of the District Court's Orders.

II. FACTUAL BACKGROUND

The Court is familiar with the factual background of this case, which is described in Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, filed on December 22, 2010 (Dkt. #161), Defendants' Supplemental Brief, filed on January 20, 2011 (Dkt. #191), and Defendants' Response to Plaintiffs' Motion to Supplement Preliminary Injunction, filed on February 28, 2011 (Dkt. # 247). Those facts are incorporated herein by reference.

III. PROCEDURAL BACKGROUND

On November 30, 2010, Plaintiffs sought a preliminary injunction on Count IV of their then-First Amended Complaint. Dkt. # 139. Count IV initially sought to compel programmatic, Gulf-wide action on applications for permits to drill for oil and gas in the Gulf in Mexico. On December 22, 2010, however, Plaintiffs moved for leave to file a Second Amended Complaint.

The proposed pleading amended Count IV to allege unreasonable delay only with respect to nine permit applications. Plaintiffs thereafter clarified that their preliminary injunction motion sought to compel a decision from BOEMRE on five of those nine applications. On January 13, 2011, the Court granted Ensco's motion for leave, now joined by Plaintiff ATP Oil & Gas Corporation, to file a Second Amended Complaint narrowing the scope of Count IV to nine specific permits, including the five that were subject to the then-pending motion for a preliminary injunction. See Dkt. # 184, 185. On January 12, the Court denied, without prejudice, Ensco's preliminary injunction. See Dkt. # 180.

On January 20, at the Court's request, the parties filed supplemental briefs addressing the Court's ability to impose a timeframe for action on Plaintiffs' permit applications, and what, if any, evidence justified the granting of the preliminary injunction as opposed to ultimate consideration of permanent relief at a later stage of these proceedings. <u>See</u> Dkt. # 188, 191.

On January 29, BOEMRE filed the administrative record for Plaintiffs' Count IV. <u>See</u> Dkt. # 215, 218. On February 17, before the parties had the opportunity to brief on the merits on the basis of the Administrative Record, the Court *sua sponte* rescinded its prior denial of Plaintiffs' preliminary injunction and issued an injunction requiring BOEMRE to issue a decision on each of the five applications within thirty days. <u>See</u> Dkt. # 229. Upon Plaintiffs' motion, the Court supplemented that order on March 1, requiring BOEMRE to issue a decision on two additional permits within thirty days. Dkt. # 250.

IV. ARGUMENT

A. Standard for Granting a Stay Pending Appeal

Under Rule 62(c) of the Federal Rules of Civil Procedure, a district court may, in its discretion, stay any interlocutory order, including one granting a preliminary injunction, during the pendency of an appeal of that order. Fed. R. Civ. P. 62(c). In order to obtain a stay pending

appeal, the moving party must: (1) make a strong showing that it is likely to succeed on the merits; (2) demonstrate that it would suffer irreparable injury if the stay were not granted; (3) show that granting the stay would not substantially harm the other parties; and (4) show that granting the stay would serve the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Rather than apply these factors in a rigid, mechanical fashion, however, the Fifth Circuit has adopted a "balance of equities approach in determining whether to grant a stay pending appeal." Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981). See also Nat'l Treasury Employees Union v. Von Raab, 808 F.2d 1057, 1059 (5th Cir. 1987). Specifically, "the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." Id. The Fifth Circuit's approach results from a common-sense interpretation of Rules 62(c) and Federal Rule of Appellate Procedure Rule 8. As the Ruiz Court reasoned:

If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue. The stay procedure of Fed.R.Civ.P. 62(c) and Fed.R.App.P. 8(a) affords interim relief where relative harm and the uncertainty of final disposition justify it.

650 F.2d at 565; see also Mazurek v. United States, No. 99-2003 C/W 99-2229, 2001 WL 260064 at *1 n.1 (E.D. La. Jan. 11, 2001) (Feldman, J.) (same); Wildmon v. Berwick Universal Pictures, 983 F.2d 21, 23-24 (5th Cir. 1992).

B. Defendants Are Likely to Succeed on the Merits of Their Appeal.

Defendants are likely to succeed on the merits of their appeal. As a threshold matter, Plaintiffs are not entitled to an order compelling BOEMRE to issue a final decision on any permit applications because Plaintiffs have not yet succeeded on the merits of their unreasonable delay claim. Count IV states nine separate claims, each of which asserts that BOEMRE's review of

a particular application has been unreasonably delayed pursuant to 5 U.S.C. § 706(1). Through their preliminary injunction motions, Plaintiffs sought to fully and finally resolve seven of those claims by asking the Court to compel BOEMRE to reach final decisions on the applications pertaining to Cobalt, Nexen, and ATP. To obtain an order compelling agency action under 5 U.S.C. § 706(1), however, a plaintiff must achieve *actual* success on the merits; a mere likelihood of success is insufficient. See Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) ("it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits."); Dresser Rand Co. v. Virtual Automation, Inc., 361 F.3d 831, 847 (5th Cir. 2004) ("[F]or a permanent injunction to issue the plaintiff must prevail on the merits of his claim"). That did not occur in this case and, accordingly, the Court's issuance of an order compelling agency action was improper. See Wilson v. Zarhadnick, 534 F.2d 55, 57 (5th Cir. 1976) (finding reversible error where district court issued permanent injunction after the hearing on a preliminary injunction motion without prior notice to parties and without first consolidating the proceedings with a trial on the merits).

But even if a motion for a preliminary injunction were an appropriate means of seeking relief under 5 U.S.C. § 706(1), the Court's February 17 finding—which the Court extended to its March 1 Order—was based upon its conclusion that the OCSLA requires Interior to act within thirty days of receiving an application for a permit to drill. See Dkt. #229 at 5–15. The OCSLA, however, imposes no such time limit. See Dkt. #161 at 11-12; Dkt. #191 at 5–7.

Instead, the merits of Count IV must be assessed separately for each permit application that Plaintiffs allege has been unreasonably delayed. The Administrative Record for Count IV

² The Court's Order appears to have relied at least in part on the OCSLA's 30-day time limit for review of Exploration Plans as its rationale for imposing the same time limit for review of APDs. The 30-day period for Exploration Plans (and the 120-day period for approval of Development Operations Coordination Documents) does not begin to run until the EP or DOCD is deemed submitted. Declaration of Michael Saucier at ¶ 11.d. n. 2 (attached hereto as Exhibit A); see also 30 C.F.R. § 250.231; 250.233.

contains those permit-specific factual circumstances. Some applications present circumstances requiring a longer processing time than others and, accordingly, the reasonableness of BOEMRE's processing time cannot be "decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful" Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1101-1102 (D.C. Cir. 2003); see also Liberty Fund, Inc. v. Chao, 394 F Supp. 2d 105, 115 (D.D.C. 2005) (rejecting as unpersuasive those decisions that have granted mandamus petitions based solely on the length of a processing delay and without sufficient consideration of other TRAC factors); Vietnam Veterans of Am., 2009 WL 6179013, at *2 (refusing argument that agency should render decisions on all claims for benefits within 90 days of receipt, and recognizing that each claim may present unique "nature, complexity, or status").

The Court assessed the agency's review time by applying the six "TRAC factors." See Dkt. #229 at 8–9. Applying those factors to this case, Defendants explained that regulatory requirements for drilling permits have significantly evolved since April 20, 2010, thereby increasing the amount of time needed to review each application. See Dkt. #161-6 ¶¶ 4, 7-10. Defendants also explained that the applications BOEMRE receives frequently lack the information that regulations require. See Dkt. #161 at 15; Dkt. #161-6, ¶¶ 18-19.

Finally, Defendants explained that BOEMRE *had* taken action on six of the seven permit applications at issue here by identifying flaws in the applications and returning them to the operator for correction. See Dkt. #161 at 12-14; Dkt. # 247 at 6-8. For example, with regard to the Cobalt Energy application for GB 959 Well #1, BOEMRE has engaged in multiple exchanges with the applicant seeking additional information to comply with the permitting requirements. See, e.g., PubIV03833; 003835; 003844. Similarly, for ATP's application for MC

941 Well #4, the Record reflects the same approach, including numerous email exchanges of information and face-to-face meetings to discuss the application. See, e.g., PubIV005889-005890; 005937-005949; 005972-005973 (reflecting on an in-person meeting between ATP and BOEMRE representatives). BOEMRE has not unreasonably delayed its review where the applications themselves are not complete. See Orion Reserves Ltd. P'ship v. Kempthorne, 516 F. Supp. 2d 8, 12-13 (D.D.C. 2007) (recognizing that a court's calculation of the time elapsed since an agency came under a "duty to act" with respect to an application does not include periods during which the application is found to be void or incomplete). Defendants also explained that BOEMRE had identified flaws in the seventh application that prevented BOEMRE from approving it, and that the operator did not plan to begin drilling until June 2011. See Dkt. #161 at 14-15.

Under those circumstances, Plaintiffs could not demonstrate that BOEMRE had unreasonably delayed a decision on any of the five applications as of January 20, 2011 (the date the parties were directed to submit supplemental briefing). Moreover, after briefing on the preliminary injunction, but before the Court's February 17 Order, Defendants submitted the Administrative Record with respect to their processing of the nine permit applications at issue in Count IV, which further demonstrates the reasonableness of BOEMRE's review process. Defendants are likely to succeed on the merits of their appeal and a stay of this Court's Orders pending appeal is therefore merited.

C. The Balance of Harms Weighs Heavily in Favor of Granting Defendants' Request for a Stay Pending Appeal.

The balance of harms in this case weighs strongly in favor of staying the Court's Orders.

The regulatory requirements that govern the permitting process are designed to prevent further loss of life and environmental and economic devastation such as occurred as a result of the

Deepwater Horizon incident. The Cobalt, Nexen, and ATP applications subject to the Court's Orders have not yet satisfied these requirements and, accordingly, they cannot be approved in their current state. See Decl. of Michael J. Saucier at ¶ 10, Attached as Exhibit A to this Motion (hereinafter "Saucier Decl."). The present state of the seven applications, combined with the Court's imposed decision deadlines, will cause harm to BOEMRE, the public, and development of the Outer Continental Shelf.

First, BOEMRE itself will be harmed in complying with the Court's Orders. Consistent with its normal practice, BOEMRE intends to assist the operators in meeting the regulatory requirements in time to allow their permits to be approved under those regulations prior to the Court's deadlines. Saucier Decl. at ¶ 11.b. To accomplish that task, however, the agency will have to refocus its permit review resources to heavily focus on these seven applications. Id. at ¶ 11.c. This will pull agency staff away from other important tasks, including review of other shallow and deepwater permit applications; correspondence and communication with other operators regarding those other applications and their current state of compliance; and review of weekly reports from active operations to ensure drilling is proceeding in accordance with approved permit applications. Id. at ¶¶ 11.b. Moreover, "with respect to the seven applications subject to the Court's orders, if the applicable thirty-day deadline approaches and the deficiencies in a given permit application have not been corrected, or if the information is submitted without sufficient time for BOEMRE to complete its review prior to the deadline, the application may have to be denied so that the agency can comply with the Court's orders." Id. at ¶ 12.d.

Second, compliance with the Court's Orders will greatly impact other operators. Because BOEMRE's resources will be focused on the seven applications, the agency will be forced to

delay its review of other applications, including applications for shallow water drilling, which may otherwise be ready for final review and approval. <u>Id.</u> at ¶ 12. This may delay resource development at these other wells, potentially causing economic harm to the companies proposing those operations. <u>Id.</u> at ¶ 12.b. That harm is underscored by the fact that shallow water drilling companies generally maintain less capital than deepwater companies, and are thus not as well situated to absorb delays in permit review or decision-making. <u>Id.</u> at ¶ 12.c.

Third, the resource reallocation that necessarily results from the Court's Orders will harm the public's interest in the efficient development of oil and gas resources. <u>Id.</u> at ¶ 12.a. Operations that may have otherwise been able to proceed in the coming weeks will be delayed; all in the name of a making a final decision on the seven applications that both the operators and BOEMRE know are not yet ready for final review. <u>Id.</u> at ¶¶ 11-12. The disruption to BOEMRE's developed iterative permit review process only frustrates Congress's stated policy of making the outer Continental Shelf available for "expeditious and orderly development subject to environmental safeguards." 43 U.S.C. § 1332(3). The Court should therefore stay its injunction pending appellate review.

By contrast, Plaintiffs themselves will not be prejudiced by the granting of the stay, because, consistent with the iterative process it follows in reviewing permit applications, BOEMRE would continue to review Plaintiffs' permit applications during a stay of the preliminary injunction. Moreover, as Defendants noted in their Motion for Summary Judgment on Counts II and III of Ensco's Amended Complaint, Ensco lacks standing to challenge the review of permits because it is not a lessee or operator. See Dkt. 42 at 6-8. In addition, Ensco failed to demonstrate that it would be injured in the absence of injunctive relief. Accordingly, it is abundantly clear that Ensco would also not be harmed by the granting of a stay. Ensco has

failed to show that it will suffer any compensable economic harm as a result of BOEMRE's orderly review of its permit applications. See Dkt. #161 at 22-23. In addition, Ensco's only other argument for injury, the loss of its skilled workforce, is similarly flawed. Id. at 23-24. Ensco has not provided a single example of an employee who has lost skills or who has left Ensco and will not be rehired. Id.

D. In the Alternative, the Court Should Enter a Temporary Stay Until Resolution By the Court of Appeals of an Emergency Stay Request.

Should the Court decide against granting Defendants' request that its Orders be stayed pending appeal, then Defendants respectfully request that the Court temporarily stay the Orders pending resolution by the Court of Appeals of an emergency motion by the United States under Federal Rule of Appellate Procedure 8(a). See, e.g., Kouba v. Allstate Ins. Co., Civil Action No. S-77-99 LKK, 1981 WL 278, *7 (E.D. Cal. Nov. 12, 1981) ("in order to facilitate defendant's Rule 8(a) application, this court grants defendant's motion for a temporary stay"). A stay for this purpose will not impose appreciable hardship upon the Plaintiffs, and will ensure that the Court of Appeals has sufficient opportunity to review the parties' competing positions on whether a stay issued by that court is appropriate.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter a stay pending appeal of its Orders granting Plaintiffs' Motion for Preliminary Injunction, or in the alternative, that it enter a temporary stay until resolution by the Court of Appeals of an emergency motion by the United States for a stay pending appeal.

Dated: March 4th, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4th, 2011, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

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